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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 446.

AMBASSADOR, INC., *et al.*,
Appellants,

v.

THE UNITED STATES OF AMERICA, AMERICAN TELEPHONE & TELEGRAPH COMPANY, and THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

BRIEF IN BEHALF OF AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY, APPELLEES.

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OPINION BELOW.

The opinion of the Court below appears in the record at pages 50-55. It has not been officially reported.

JURISDICTION.

The appellants invoked the jurisdiction of this Court under the provisions of the Expediting Act approved February 11, 1903, as amended, 15 U. S. C., Section 29, 49 U. S. C., Section 45, and Section 238(1) of the Judicial

Code, as amended, 28 U. S. C. 345, as extended by Section 401(d) of the Communications Act of 1934, as amended, 47 U. S. C., Section 401(d).

STATEMENT.

This brief is filed on behalf of the American Telephone and Telegraph Company and The Chesapeake and Potomac Telephone Company, appellees. (It will be convenient to speak of them as the telephone companies or, with respect to the service they join in furnishing, simply as the telephone company.) In the District Court the Government sought an injunction against the telephone companies as well as against the hotels to restrain violation of the tariff in issue. The reason advanced by the Government for an injunction against the telephone companies was that they had continued to render service to hotels which were making surcharges on interstate and foreign toll calls of their guests in violation of the tariff. The District Court held that this did not constitute a violation of the tariff on the part of the telephone companies and denied an injunction against them, but retained jurisdiction to enjoin them from rendering service to hotels which might thereafter violate the injunction granted against the hotels, if that should become necessary to effectuate the court's decision (R. 55, 69). There has been no appeal from the denial of an injunction against the telephone companies, but the hotels have appealed from the injunction against them.

It is the position of the telephone companies here, as it was below, that the tariff provision in question is valid and should be enforced. It is also their position that the District Court correctly decided that no injunction should be awarded against the telephone companies.

We take no issue with the statement of facts in the brief for the appellants (whom we shall call the hotels) except in so far as they claim to be "procuring" equipment from the telephone company, paying the telephone company for that equipment and then "furnishing" telephone facilities so procured to their guests (Brief, pp. 7, 8, 52). This is a misconception. The equipment in the hotels is the property of the telephone company, installed and maintained by it as an integral part of its own plant. It is not rented to the hotels, although some part of the charges for service furnished under local tariffs is computed in terms of the equipment installed. What the company furnishes and charges for is telephone service. The service subscribed for by the hotels is available for use both by the management of the hotels and by the guests.

The material differences between the hotels and the telephone companies relate, however, not to matters of fact but to the nature of the tariff and its legal effect. This brief will be addressed to those differences and the facts will not be restated except where necessary to make our position clear.

To clear the ground, let us say at once that we agree with the position of the hotels thus far,—that they are not common carriers, that they are not agents of the telephone companies, and that their surcharges are charges for hotel services and not charges for wire communication under the provisions of the Communications Act. With these points behind us, a brief examination of the nature of the tariff provision should dispose of the controlling issue in the case.

ARGUMENT.

I.

The Tariff is a Valid Regulation stating a Condition upon which Telephone Service is Furnished to Hotel Subscribers, and not a Publication of Charges for Hotel Services or an Illegal Interference in the Hotels' Business.

Section 203(a) of the Communications Act requires common carriers to file tariffs showing their charges for telephone communication, and the classifications, practices and regulation affecting such charges.* The hotels contend in their brief (pp. 32-35) that the tariff provision in issue is not validly filed pursuant to that section, but is instead an unauthorized attempt of the telephone companies to publish for the hotels, which are not common carriers, charges collected by the hotels for hotel services, which are not communication service under the Act. Accordingly, it is argued that a violation of the tariff provision does not constitute violation of Section 203(a), and the suit, which is predicated on that theory, must fail.

The tariff will not bear the construction the hotels seek to place upon it. It was filed by the telephone companies in compliance with the report and order of the Federal Communications Commission in its investigation of hotel surcharges in the District of Columbia, its Docket 6255 (R. 14), which required the telephone companies either to file in their tariffs schedules of the charges to be collected by hotels or to deal with the matter by filing a regulation prescribing the conditions upon which the service is furnished (R. 37). The telephone companies chose the latter

* Subsections (a), (b) and (c) of Section 203 of the Act are printed as an appendix to this brief.

course and filed the tariff regulation in issue (R. 38), which reads as follows:

> "Message toll telephone service is furnished to hotels, apartment houses and clubs upon the condition that use of the service by guests, tenants, members or others shall not be made subject to any charge by any hotel, apartment house or club in addition to the message toll charges of the Telephone Company as set forth in this tariff."

As the choice of the alternatives required, this regulation is the antithesis of a schedule of hotel surcharges. It deals with the hotel as a subscriber, not a connecting carrier, and requires it as a subscriber to comply with a specified condition in order to receive service. It does not fix any amount (or zero) as what a hotel may charge for hotel service or any thing else; it only prohibits a method of collecting such charges by imposing them on the use of the telephone service. It plainly means that a guest shall not be required to pay any additional charge, or surcharge (regardless of what it is for) as the *result* of having used the telephone service for which the hotel subscribes. It does not mean that the hotels may charge only so much for their hotel services in connection with toll calls, or, as the hotels contend, prevent them from seeking reimbursement of their expenses from their guests in some form, as, for example, by increasing room charges. Any method of reimbursement under which imposition of the charge is not dependent on the use of the telephone service is permissible.

The hotels do not rest their case on their construction of the tariff provision as a schedule of hotel charges. They contend further (Brief, pp. 46-55) that it is invalid as a regulation of the use of the service for two reasons:—

first, it is not the kind of regulation authorized or permitted by Section 203(a), and, second, it is in substance an arbitrary and capricious regulation of the hotel business beyond the power of the telephone companies to impose or the Commission to prescribe.

The first contention is briefly that the regulations specified in Section 203(a) are those "affecting" the carrier's charges; the regulation prohibiting hotel surcharges does not "affect" the amount of the telephone company's charges; consequently a violation of the regulation will not support a suit based on Section 203(a) (Brief, pp. 46, 47). The argument is highly technical and requires a construction of the statute too narrow to be tenable. It concentrates attention upon a few words of Section 203(a) and ignores the broad regulatory purposes expressed in this part of the Act. It also ignores the reference in Section 203(c) to the "privileges" which are permitted to be extended only "as specified in such schedule."* But upon a proper construction even the language of Section 203(a) upon which the hotels rely does not sustain their position.

The charges which Section 203(a) requires the carriers to publish in their tariffs are not mere amounts of money. They are charges for communication service and are not complete or intelligible unless, along with the amounts to be paid, there is a statement of what the payments are for. In order to file the charges for toll service furnished to hotel subscribers, this service must be sufficiently described in the tariffs to inform the public and the Commission of what the hotel subscribers get for their money. The regulation which prohibits hotels from imposing surcharges on

* See the text of this subsection in the appendix.

toll calls made by guests is a proper element in the description of the service because it is a limitation on the use that may be made of the service. It prevents the hotels from using the service as a means of collecting their charges for hotel service. The regulation consequently was properly filed even under the narrow wording of Section 203(a).

In their second argument against the validity of the tariff regulation (Brief, pp. 48-55), the hotels concede (Brief, p. 48) that a carrier may attach reasonable conditions to the furnishing of its service, but contend that this regulation so obviously transcends all possible bounds of reasonableness that it is invalid. Since the hotels admit that the determination of reasonableness is for the Commission in the first instance, and have a complaint raising that issue now pending before the Commission, their argument here must be that action of the Commission prescribing or approving the regulation would be so arbitrary and capricious as to be void.

The hotels suggest as a test of the validity of a regulation that it shall "affect the telephone companies in their business, and not the subscribers in theirs" (Brief, p. 49). The regulation in issue clearly meets the first half of this test, for it obviously affects the telephone companies in their business. Under the terms of this regulation a guest at the Shoreham Hotel upon making a long distance call has to pay the telephone company's tariff charge plus the federal tax. Without the regulation, upon making the same call, he would have to pay the tariff charge, the tax and perhaps as much as three dollars more. Whether the user has to pay that extra three dollars directly affects the business of the telephone company. Such additional charges are necessarily a deterrent to the use of the service and a

disturbing element in the relations of the telephone companies with the public. The investigation of the Commission in Docket 6255 (See R. 15, footnote) following a succession of court and commission cases, is sufficient evidence that hotel surcharges have been a continuing problem to the telephone industry and a continuing source of complaints to the regulatory authorities.

The second half of the test, *i.e.*, that the regulation must not affect the subscribers in their business, is obviously unsound. Regulations frequently restrict or "affect" the use which the subscriber can make of the service. If the subscriber uses the service in his business, then to that extent the regulation "affects" the subscriber's business. An example is the type of regulation which restricts the use of business service to the subscriber, his agents and representatives (*Cf.* R. 220). This prevents a tradesman from allowing his customers to use his telephone service and clearly "affects" the tradesman's business. Such regulations have nevertheless been sustained. *1015 Chestnut Street Corp.* v. *Bell Telephone Co. of Pennsylvania*, PUR 1931A, 19, 7 PUR (NS) 184 (1930, 1934); *Budd* v. *Southwestern Bell Telephone Co.*, 28 PUR (NS) 235 (Mo. P. S. C., 1939). Regulations of electric utilities which prohibit submetering or resale of public utility service obviously affect the business of the consumers but have not been condemned on that account. *Lewis* v. *Potomac Electric Power Co.*, 64 F. 2d 701 (App. D. C.); *Florida Power & Light Co.* v. *State*, 107 Fla. 217, 144 So. 657 (1932); *Sixty-Seven South Munn Inc.* v. *Board of Public Util. Com.*, 106 N. J. Law 45, 147 Atl. 735 (Sup. Ct. 1929) affd. 107 N. J. Law 386, 152 Atl. 920 (Court of Errors and Appeals, 1930), cert. den. 283 U. S. 828.

The surcharges at which the present regulation is directed are collected only when the toll service of the

telephone company is used. The amount of the surcharge is graduated according to the extent to which that service is used as reflected in the tariff charge of the telephone company, not according to how much hotel service is furnished in connection with the call. Thus, the regulation here in issue has a direct relation to the use of the telephone service and does not seek to regulate practices of the hotel except in that relationship. It removes a source of difficulty in the use of the telephone company's service by hotel guests, and goes no further than necessary to accomplish its purpose of keeping that service free from "toll gate" charges. The interest of the public and the telephone companies in preventing the hotels from imposing "toll gate" charges on access to telephone service has been pointed out. It simply cannot be said that a regulation to accomplish that result so transcends all bounds of reasonableness that it could not possibly be sustained by the regulatory authority and must therefore be stricken down by the Court as arbitrary and capricious.

II.

Injunction against the Telephone Companies was Properly Denied.

Counsel for the Commission contended below (R. 205, 206) that the telephone companies violated the tariff in at least a technical sense by continuing to render service to hotels which were making surcharges. The District Court held that the telephone companies had not violated the tariff and denied an injunction against them (R. 54). A brief review of this aspect of the case will show that the action of the District Court was correct.

The practice of the Washington hotels of imposing surcharges on toll calls was of long standing (R. 159). The regulation prohibiting surcharges was published and filed January 22, 1944 to become effective on February 15, 1944 (R. 121, 282). This constituted legal notice, but the telephone companies nevertheless brought the regulation directly to the attention of the hotels and endeavored to persuade them to comply with it (R. 121-126). These efforts were being continued when this suit was brought by the Government on February 19, 1944 (R. 2), four days after the tariff became effective. An interlocutory injunction under which the telephone companies would have been compelled to cut off service to the hotels was sought (R. 10). The hotels on their part brought suit in the District Court for the District of Columbia to set aside the order of the Commission pursuant to which the tariff was filed, and that suit is still pending (R. 67). Thus, since four days after it became effective, the validity of the tariff has been sharply contested and is now before this Court for final determination.

The telephone companies believe that the tariff is valid and must be complied with. As in the case of other regulations applicable to subscribers, compliance may be secured in various ways, as, for example, by explanation and persuasion, by litigation or by cutting off service. Statement of the regulation as a condition upon which service is rendered puts the hotels on notice that the latter, and most drastic, means of securing compliance may be used. It does not mean that it is the only means of securing compliance available to the telephone companies. In this case, the telephone companies did all in their power to secure compliance with the tariff by explanation and persuasion. While so

engaged, of course they did not start any litigation or cut off service. Within four days after the tariff became effective, and before the companies had completed their efforts to bring about compliance, the Government started this suit. Under the circumstances, the telephone companies can not be held to have violated the tariff, and an injunction against them was properly denied.

CONCLUSION.

It is respectfully submitted that the judgment of the District Court should be affirmed.

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February 27, 1945.

APPENDIX.

The Communications Act of 1934, 48 Stat. 1064 (U. S. C., Title 47, Secs. 151 *et seq.*), provides *inter alia:*

"Sec. 203. (a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this Act when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

"(b) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after thirty days' notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe; but the Commission may, in its discretion and for good cause shown, modify the requirements made by or under authority of this section in par-

ticular instances or by a general order applicable to special circumstances or conditions.

"(c) No carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule."